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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration, Operations

SUBJECT: Stainless Steel Sheet and Strip in Coils from Germany: Issues and Decision Memorandum for the 2002 - 2003 Administrative Review

SUMMARY:

We have analyzed the comments and rebuttal comments of interested parties in the 2002 - 2003 administrative review of the antidumping duty order covering stainless steel sheet and strip in coils from Germany. As a result of our analysis, we have made changes, including corrections of certain programming and clerical errors, in the margin calculations. We recommend that you approve the positions we have developed in the "Discussion of Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments by parties:

1. Repurchase of ThyssenKrupp AG Shares
2. Interest Income Offset
3. Adjustment for Packing Cost
4. NSC Bundled Sales
5. Treatment of Non-dumped Sales
6. Whether to Split Gauge Group 16
7. Other Revisions

BACKGROUND

On August 6, 2004, the Department of Commerce (the Department) published the preliminary results of administrative review of the antidumping duty order covering stainless steel sheet and strip in coils from Germany. See Stainless Steel Sheet and Strip in Coils from Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review, 69 FR 47900 (August 6, 2004) (Preliminary Results). The merchandise covered by this order is stainless steel sheet and strip in coils as described in the "Scope of the Review" section of the Federal Register notice. The period of review (POR) is July 1, 2002, through June 30, 2003. We invited parties to comment on our Preliminary Results. This review covers ThyssenKrupp Nirosta GmbH, ThyssenKrupp VDM GmbH, and their various affiliates (collectively, TKN or respondent).

In response to our Preliminary Results, we received case briefs from TKN and Allegheny Ludlum, AK Steel Corporation, Butler Armco Independent Union, J&L Specialty Steel, Inc., North American Stainless, United Steelworkers of America, AFL-CIO/CLC, and Zanesville Armco Independent Organization (collectively, petitioners) on September 7, 2004. Both parties submitted rebuttal briefs on September 13, 2004.

Comment 1: Repurchase of ThyssenKrupp AG Shares

Petitioners argue the Department should adjust TKN's U.S. selling expenses to account for expenses of **i** 406 million related to a share buyback from the Government of the Islamic Republic of Iran. Petitioners assert ThyssenKrupp AG (TKAG) repurchased 16.9 million TKAG shares from the Islamic Republic of Iran at **i** 24, a premium when the market price at the time was **i** 8.92 per share. Petitioners maintain TKN's argument that the buyback was a capital transaction that should not be recognized as either income or expense is without merit.

Petitioners contend repurchasing shares at an above-market premium represents an additional selling expense which must be applied to TKN's U.S. prices. (See Petitioner's case brief at pages 3-4.) Petitioners assert TKAG's decision to book the repurchase solely as a "capital transaction," even if acceptable for accounting purposes, is not dispositive for antidumping purposes. Petitioners contend that TKAG's share purchase represents more than the capital transaction contemplated in Financial Accounting Standards Board Technical Bulletin 85-6 (FTB-85-6) and represents a cost to the company. Petitioners assert this is because TKAG repurchased the shares to avoid serious damage to its business activities. Petitioners cite Silicomanganese from India: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination, 67 FR 15531 (April 2, 2002) and the accompanying Issues and Decision Memorandum at Comment 14, to support their claim that the Department has the discretion and authority to reclassify expenses regardless of how they were recorded.

Petitioners maintain the premium paid in connection with the share buyback constitutes an expense that results from, and bears a direct relationship to sales to the United States. According to petitioners, TKAG was forced to buy back these shares from the Government of Iran, because U.S. trade sanctions against Iran bar transactions with any firm in which Iran held an equity interest of more than five percent. To avoid these sanctions, TKAG had to buy down Iran's equity share in TKAG. See petitioners' submission of December 18, 2003. Petitioners argue the buyback resulted from U.S. sales by TKAG's affiliates (TKNNA, TKVDM USA, AST USA, and Mexinox USA). Petitioners insist the buyback is an expense directly related to economic activity in the United States, because it reduced the Iranian Government's ownership interests in TKN's American subsidiaries and allowed the subsidiaries to do business in the United States. Petitioners argue that the Department should at the very least consider the share buyback as an indirect selling expense.

Next, petitioners assert the Department should apply adverse facts available when accounting for the premium paid by TKAG in buying back its own shares, because TKN refused to respond to the Department's request for information regarding the measure of its buyback costs in proportion to its U.S. sales. See Petitioners' Case Brief at 11. Petitioners claim TKN could and should have provided the requested information, as it could have made its arguments concerning the necessity of an adjustment after providing the Department with the information requested. Petitioners argue TKN has failed to cooperate to the best of its ability by directly refusing to provide the Department with the information required to most accurately and completely measure the costs of its share buyback program. Petitioners state that if the Department does not apply adverse facts available to account for the share premium, it should apply facts available using existing record evidence. They encourage the Department to deduct the premium paid by TKAG to repurchase the shares allocated over affected U.S. sales value.

TKN asserts that there is no link between TKAG's share repurchase and TKN's U.S. sales of subject merchandise during the POR. TKN contends there is record evidence related to the share repurchase which demonstrates that its purpose related specifically and solely to restrictions imposed on certain Department of Defense procurement contracts under 10 U.S.C. section 2327. The law does not apply generally to TKN's sales of subject merchandise; however, it does apply to TKAG affiliates worldwide that engage in the specified defense procurement contracts, including contracts outside the United States. TKN argues TKAG's decision to repurchase the shares has no relationship to sales of subject merchandise, and thus, should not be treated as a direct or indirect selling expense.

TKN states its independent auditors, KPMG, reviewed the May 2003 share repurchase during their audit of TKAG's 2002/2003 financial statements and determined that FTB 85-6 is applicable. TKN states KPMG examined the facts surrounding the share repurchase and concluded that under FTB 85-6, the entire amount of the cost of the repurchased shares was properly accounted for as a reduction of shareholders' equity. TKN cites TKAG 3rd Quarter FY 2003 Interim Report and TKAG FY 2003 Financial Report. See TKN's Rebuttal Brief at 5. TKN asserts the Department routinely defers to the findings of independent auditors under GAAP where there is no record evidence to contradict their findings. Moreover, TKN argues the Department's established practice with respect to share repurchases is consistent with KPMG's assessment of the proper treatment of this transaction under GAAP. See Stainless Steel Bar From Japan: Final Results of Antidumping Administrative Review, 65 FR 13717 (March 14, 2000) and the accompanying Issues and Decision Memorandum, and Certain Cold-Rolled Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Review, 63 FR 781 (January 7, 1998).

TKN argues the applicable accounting rules and principles support the independent auditors' treatment of the share repurchase as a capital transaction rather than as an expense because TKAG received only its capital stock as consideration.[1] TKN emphasizes that unless other consideration is received from the selling stockholder, a corporation's acquisition of its own stock is solely a capital transaction that results in a direct reduction of shareholder equity, with an intermediate debit to an expense item on an income statement. The transaction itself has nothing to do with respondent's operations and thus should not be characterized or construed as generating an income statement expense. It is a direct debit to shareholder equity because it is a pure capital transaction. See TKN's Rebuttal Brief at 10.

Secondly, TKN contends there is no basis in law or fact to treat the share repurchase as a direct or indirect selling expense associated with U.S. sales of subject merchandise. TKN states arguments made in Silicomanganese from India regarding share repurchases were that such amounts should be included as part of financing or general and administrative expenses, not selling expenses. TKN argues section 351.410(c) of the Department's regulations defines direct selling expenses as expenses, such as commissions, credit expenses, guarantees and warranties, that result from, and bear a direct relationship to, the particular sale in question. See TKN's Rebuttal Brief at 13. TKN states that pursuant to section 772(d)(1)(B) of the Tariff Act of 1930 as amended (the Act), the requirements before an expense can be treated as a direct selling expense are: 1) it must be incurred by or for the account of the producer, exporter or affiliated importer; 2) it must have been incurred in selling the subject merchandise; and 3) it must result from, and bear a direct relationship, to the sale. See id. TKN asserts the share repurchase does not satisfy the requirements to classify it as an expense. Because the stock repurchase agreement was made solely to comply with a Department of Defense procurement law, TKN asserts that the transaction has no bearing to its U.S. sales.

TKN's final argument on this point is that there is no basis for applying adverse facts available to account for the share repurchase. Respondent claims that it did answer the Department's request for information concerning the total cost of the share repurchase. Specifically, TKN reported the price paid for the share and the market value of the shares at the time. In response to the Department's request for the amount of TKAG's net U.S. sales during the POR, TKN reported the approximate value of U.S. sales by TKAG Group companies in FY 2003, which was the closest data available to the POR. Therefore, TKN argues it did comply to the best of its ability with the Department's

[1] FTB 85-6 states that "if no stated or unstated consideration in addition to the capital stock can be identified, the entire purchase price should be accounted for as the cost of treasury shares."

information request by providing all of the requested factual information relating to the share repurchase. Accordingly, TKN believes there is no justification for applying adverse facts available in this case.

Department's Position:

We agree with respondent. When a company acquires its own shares, those shares are considered treasury stock. Treasury stock is not classified as an asset in a company's balance sheet whereas gains or losses on sales of assets are recognized at the time that such sales occur. As noted, however, treasury stock is not an asset. While the share buyback resulted in a reduction in stockholder's equity, there was no gain or loss to be accounted for from the sale of any asset. Nor did the resulting change in shareholder equity have any bearing on TKN's U.S. sales activity relating to subject merchandise.

We further note that a corporation does not realize a gain or suffer a loss from stock transactions with its own stockholders. Treasury stock can either be retired or reissued. A company neither earns an income nor incurs an expense when it purchases or sells treasury stock. See Kieso, Donald, and Weygandt, Jerry, Intermediate Accounting, Ninth Edition, New York: John Wiley & Sons, Inc., 1998 at pages 771 - 774. Moreover, any costs associated with TKAG's reacquisition of its own equity do not qualify as "expenses." Based upon the foregoing, there is no link between TKAG's repurchase of its shares and sale of subject merchandise that occurred in the United States. Finally, we disagree with petitioners' assertion that TKN was unresponsive on this issue and that TKN's unresponsiveness merits application of adverse facts available. TKN reported the approximate value of the U.S. sales by the TKAG group companies, and responded to each of our requests for additional information on this matter. Therefore, for these final results, we continue to treat TKAG's share repurchase not as a selling expense, but as a reduction in stockholder's equity.

Comment 2: Interest Income Offset

In reporting its net financial expenses, TKN offset interest expenses with short-term interest income. Respondent argues the Department should use the interest income offset as reported in the audited consolidated financial statements of parent company TKAG. Respondent claims the descriptions of the general ledger accounts comprising the interest income amount show the interest income items listed under these accounts are short-term in nature and, thus, appropriate as an offset to interest expenses. In addition, TKN argues "miscellaneous financial expenses" are not interest related, so therefore should not be included in the net interest expense ratio.

Petitioners object to TKN's request that the Department use TKAG's interest income offset as TKN originally reported. Petitioners argue the respondent's claim that the short-term nature of certain interest income account names is self-evident does not provide substantial evidence to overcome the Department's verification findings that TKN could not support its claim that these accounts represent only short-term interest income. Petitioners suggest the Department should continue to apply the revised short-term interest income offset as calculated for the preliminary results.

Department's Position:

We agree with petitioners. At verification TKN provided a schedule of interest income by general ledger accounts, but failed to substantiate its claim that these accounts pertain exclusively to short-term interest income. As noted in the Notice of Final Determination of Sales At Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand, 69 FR 34122 (June 18, 2004), the Department excluded the respondent's short-term interest income offset because neither of the respondent's audited financial statements reported any breakdown of long- versus short-term income, nor was the respondent able to provide support for its claimed short-term interest income. In this case, we used the revised amount of short-term interest income calculated in the preliminary results to offset financial expenses. (See July 29, 2004 Preliminary Analysis Memorandum to the File at 7.) We confined the calculation of short-term interest expense to those accounts that were entirely short-term in nature. We continue to use this calculated offset amount in our final results.

Comment 3: Adjustment for Packing Cost

Respondent argues that in the preliminary results, the cost of sales denominator used in the calculation of the interest expense rate was adjusted incorrectly for packing expenses. TKN notes the Department estimated the amount of packing expenses to adjust the cost of sales at the consolidated TKAG level by using the ratio of packing expenses to cost of goods sold recorded by TKN at its stainless operations. While TKN agrees the adjustment to the cost of goods sold denominator for packing costs is appropriate, TKN claims the manner in which the adjustment was made is not. According to respondent, this is because the consolidated TKAG entity comprises a vast array of companies involved in diverse activities, ranging from real estate management to elevator construction. Under these circumstances, TKN argues, it is not reasonable to apply the respondent's unique experience as stainless steel producers to the consolidated costs of their parent, TKAG.

Petitioners state the Department should not revise its non-adverse facts available used for the preliminary results to adjust for the respondent's failure to quantify TKAG's consolidated packing expenses.

Department's Position:

We agree with petitioners. It is the Department's normal practice to exclude packing expenses from its interest expense rate calculation. Due to the structure of TKAG, the amount of TKAG's packing expense could not be isolated from TKAG's cost of sales. Because the amount of TKAG's packing expense cannot be determined, we continue to maintain that using the ratio of TKN's packing cost to its cost of sales (and applying that resulting ratio to represent TKAG's packing cost) is a reasonable approximation of TKAG's packing expenses, absent any quantification of TKAG's actual experience. We note this is the methodology we have used in past reviews of this case. See "Issues and Decision Memorandum for the Antidumping Investigation of Cold Rolled Carbon Steel Flat Products from

Germany; Notice of Final Determination of Sales at Less Than Fair Value," 67 FR 62116 (October 3, 2002) (Comment 17). Thus, for the final results, we continue to estimate TKAG's consolidated packing expenses based on the ratio of packing expenses to cost of goods sold experienced by TKN, and deducted these expenses from the consolidated cost of sales used as the denominator for the interest expense rate calculation.

Comments 4: Bundled NSC Sales

In this, as in past, segments of these proceedings, TKN's affiliated reseller, NSC, reported "bundled" sales, i.e., sales of odd sizes of stainless steel bundled together and sold "as is." Petitioners assert the Department should consider applying partial adverse facts available, in light of TKN's failure to reveal that its bundled sales reporting included instances wherein TKN reported mixtures of various grades of stainless steel within the same bundle. Petitioners assert TKN's failure to report the NSC bundled sales of ferritic materials on a grade-specific basis represents a material omission that understates the degree to which these bundled sales deviate from TKN's customary sales practices in the normal course of business. Petitioners contend the Department should apply partial adverse facts available since this issue likely affects all ferritic bundles sales made by NSC. Petitioners urge the Department to consider the application of the highest single non-NSC ferritic price to the sales of bundled ferretic grades as partial adverse facts available.

Alternatively, petitioners urge the Department to consider excluding all of NSC's bundled sales from the analysis because these sales may be re-exported to third countries.

Respondent argues that, as in prior segments of these proceedings, the Department should not apply adverse facts available with respect to bundled sales. While acknowledging that the first surprise sale contained mixed grades of merchandise, TKN notes that the Department uncovered no further instances of such reporting during its verification.

TKN states that during NSC's surprise sales trace 1 at verification, the grade field listed a particular grade, which the NSC personnel responsible for preparing the NSC sales database reasonably believed was accurate. TKN argues its failure to note, in the NSC invoicing system, that this transaction comprised various grades of stainless steel is functionally the same as any other inadvertent data input error. TKN contends this issue was discovered for the first time at verification, and only as a result of reviewing the paper documentation requested to verify the selected sale. TKN claims NSC's electronic invoicing system does not identify the bundled sales involving multiple grades; therefore, the only means by which to identify this limited subset of the bundled sales would be to manually review each paper invoice and packing list for all such sales. However, TKN asserts the electronic invoicing system otherwise is accurate and complete. TKN therefore concludes it had no reason to undertake a manual review of the paper invoices and packing lists before this issue was discovered at verification.

TKN contends petitioners failed to note that, of the six sales the Department chose to verify, five were bundled sales, including four bundles involving ferritic products. TKN points out the Department verifiers noted no other discrepancies with respect to NSC surprise sales trace 1, nor with respect to any of the other NSC sales examined at verification. TKN argues petitioners have ignored the point that the price NSC charges for its bundled sales of non-prime ferritic products does not vary depending upon the grade of the product sold. TKN states regardless of the grade listed for such sales, the price would be the same.

TKN further claims all but one of the bundled sales were made below the cost of production, at prices significantly below the prices for prime products with the same CONNUM. TKN argues that during the POR U.S. subject sales of non-prime ferritic products accounted for less than five percent of total U.S. subject sales. The bundled sales of non-prime ferritic products would have, at most, a negligible impact on the Department's margin calculation.

TKN then argues the bundled sales should be excluded from the final margin calculation. Respondent contends where a relatively small number of home market sales are missing certain characteristics that are not commercially meaningful, the Department's practice, as affirmed by the Court of International Trade, is to exclude the sales from its margin analysis. See Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada; Final Results of Antidumping Duty Administrative Reviews, 61 FR 13815, 13830-31 (March 28, 1996). TKN agrees with petitioners that the Department should exclude the NSC bundled sales from the final margin calculation.

Department's Position:

As in previous reviews of this case, the Department calculated a dumping margin utilizing the database submitted by TKN on behalf of its affiliated resellers. The Department finds TKN has been cooperative and acted to the best of its ability, and therefore will not apply partial adverse facts available. While the Department agrees that grade is a critical product characteristic, there is no evidence of any systematic failure by TKN to report accurately the grades of steel involved in each transaction. Rather, we find the lone incidence of mixed grades uncovered at verification represents an isolated discrepancy which was fully explained by the respondent at the time. See Memorandum to the File: "Verification of ThyssenKrupp Nirosta GmbH and ThyssenKrupp VDM GmbH (collectively TKN) and affiliate Nirosta Service Center," August 26, 2004 at 24 through 26. Because the Department's verification confirmed the accuracy of TKN's reported sales data, the Department will continue to utilize all home market sales reported by TKN.

No adverse inference is warranted because TKN has provided the physical characteristics for sales by its affiliated reseller, NSC, in the most precise manner permitted by its accounting system. With respect to the grade of steel sold in NSC's bundled sales, the Department found one instance where several grades of steel were combined on a single invoice. The Department found no other examples of such mixed reporting during its sales traces and otherwise determined the information retrieved from NSC's records is reliable and accurate.

With respect to the other physical characteristics reported by TKN, the company has demonstrated in this review, as in previous reviews, that NSC performed to the best of its ability to retrieve the product characteristics required by the Department. When actual product information was not available, the Department accepted TKN's methodology in reporting surrogate values for ROLLH, GAUGEH, FINISHH, and WIDTHH.

TKN was able to provide the five remaining physical characteristics and relevant transaction-specific information, such as gross unit price, billing adjustments, etc. The Department finds the remaining physical characteristics and sales information are sufficient for the purpose of calculating TKN's antidumping margin. We find nothing in the record to indicate that relying on the surrogate values produced by TKN for the missing information, as we have in prior reviews, is in any way distortive or unreasonable, given the commercial realities attendant to these transactions (i.e., that these characteristics were irrelevant to the final customer and were, therefore, not recorded by TKN). Our acceptance of TKN's surrogate information in the prior review was affirmed by the Court of International Trade. See AK Steel v. United States, No., 03-00102, Slip. Op. 04-108 at 15 (CIT August 25, 2004).

We continue to find TKN has exercised due diligence in reporting its sales data, undertaking a manual search for the missing information and providing these data to the extent they were available. See Stainless Steel Sheet and Strip in Coils from Germany; Notice of Final Results of Antidumping Administrative Review, 69 FR 6262 (February 10, 2004).

Comment 5: Treatment of Non-Dumped Sales

TKN states that in the preliminary results, the Department calculated the overall dumping margin by assigning a zero-percent dumping margin to U.S. sales made at or above home market prices. TKN argues the practice of "zeroing" constitutes a violation of the Department's obligations under U.S. law. Citing Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995), Viraj Forgings Ltd. v. United States, 206 F. Supp. 2d 1288, 1296 n.14 (CIT 2002), and Fundicao Tupy S.A. v. United States, 652 F. Supp. 1538, 1543 (CIT 1987), TKN states it is a well-established principle of U.S. law that the Department must interpret and apply the U.S. dumping laws in a way that does not conflict with international obligations, including obligations under the World Trade Organization (WTO) Antidumping Agreement. TKN asserts this principle is rooted in Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804) (Charming Betsy), in which the Supreme Court declared that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." TKN maintains the doctrine set forth in Charming Betsy is still in effect today.

Citing, inter alia, Böwe Passat Reinigungs-Und Wäschereitechnik GmbH v. United States 926 F. Supp. 1138 (CIT 1987), Corus Engineering Steels Ltd. v. United States, Slip Op. 03-110 (CIT 2003) (Corus) and PAM, S.p.A. v. U.S. Department of Commerce, Slip Op. 03-48 (CIT May 8, 2003) (PAM), TKN asserts the Court, even though it upheld the Department's practice of zeroing, found "the statute neither requires nor prohibits {the Department} from considering non-dumped sales." See TKN's Case Brief at 20, quoting Corus at 13-14 (TKN's emphasis deleted). TKN contends the Department adopted and applied its zeroing practice solely as a matter of interpretive "gap-filling." TKN argues the Department is obligated to exercise its gap-filling authority so as to reach a result that is consistent with international law.

TKN maintains the Department's interpretation of the statute, to the extent it is reasonable, is generally given deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (Chevron). However, TKN argues, when the Department's interpretation is inconsistent with U.S. international obligations, such deference is inappropriate. TKN avers that Hyundai Electronics Co., Ltd. v. United States, 53 F. Supp. 2d 1334 (CIT 1999) (Hyundai Electronics) is instructive on this point. In Hyundai Electronics, TKN notes, the Court contemplated a revocation standard promulgated by the Department that recently had been rejected by a WTO panel. While the Court eventually found it was possible to reconcile the Department's revocation standard with the WTO Antidumping Agreement, TKN states, the Court stressed that Chevron and the Charming Betsy doctrine must be applied together when the latter is implicated. See TKN's Case Brief at 22, citing Hyundai Electronics at 1344.

TKN asserts the same analysis must be applied in this case. Since the statute is silent with respect to "zeroing" and the Department has adopted this practice as an interpretation of the statute, TKN claims the relevant question is whether the Department's interpretation is compatible with the WTO Antidumping Agreement. TKN contends the WTO Appellate Body's decision in European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) (Bed Linen from India) and more recently in United States Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (August 11, 2004) (Softwood Lumber from Canada) establishes that "zeroing" is not compatible with the Antidumping Agreement. See TKN Case brief at 23.

TKN argues it is irrelevant that the United States was not the appellee in Bed Linen from India. Furthermore, TKN asserts, it is also irrelevant that Bed Linen from India entailed an investigation rather than an administrative review because the terms of Article 2 of the Antidumping Agreement are made applicable to the determination of assessment amounts in the context of administrative reviews by virtue of Article 9.3 of the Antidumping Agreement.

Since U.S. antidumping laws do not require "zeroing," TKN argues, there is no direct conflict between U.S. law and international law. Further, TKN asserts, under the Charming Betsy doctrine the U.S. antidumping statute must be interpreted in a way that is compatible with the WTO Antidumping

Agreement. Therefore, TKN submits, any interpretation of U.S. antidumping law that permits "zeroing" in the calculation of the aggregate dumping margin is prohibited as a matter of U.S. law under Charming Betsy.

Petitioners respond that in each instance in which the issue of "zeroing" has been raised, the Department has correctly dismissed this argument and maintained its current practice.
Petitioners contend TKN incorrectly argues the Appellate Body's decision in Softwood Lumber from Canada. First, petitioners assert Softwood Lumber from Canada is limited to the Department's "zeroing" policy as applied to the specific and unique facts of the Softwood Lumber from Canada antidumping investigation, rather than a ruling of the WTO on the propriety of the U.S. "zeroing" as such. See Petitioners' Rebuttal Briefs at 17. Petitioners cite a passage of the decision to emphasize the Appellate Body made clear at the outset that its ruling was confined to the particular facts of Softwood Lumber from Canada. See Petitioners' Rebuttal Brief at 18.

Petitioners maintain Softwood Lumber from Canada has no relevance to "zeroing" in the context of administrative review proceedings. They add that it is in administrative reviews that the Department calculates dumping margins on an entry-by-entry basis, for duty assessment purposes. Id. Petitioners assert the U.S. Court of Appeals recently stated in Timken Co. v. United States, 354 F.3d 1334, 1342-43 (Fed. Cir. 2004), the Department's practice of "zeroing" negative dumping margins comports with this approach by allowing the Department to fully neutralize dumped sales without having an effect on fair-value sales. Petitioners also cite as examples Serampore Industries PVT Ltd. v. United States, 675 F. Supp. 1353 (CIT 1987) and Böwe Passat Reinigungs-und Wäschereitechnik GmbH v. United States, 926 F. Supp. 1138 (CIT 1996).

Petitioners assert the Court held that the Department reasonably interpreted section 771(35)(A) of the Act, which defines "dumping margin" as the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise, thus allowing "zeroing." See Petitioners' Rebuttal Brief at 19. Petitioners state that in the final analysis, the Department's responsibility is to interpret the U.S. antidumping statute, which necessarily often means "filling gaps" that Congress has either deliberately or inadvertently left in the statutory regime. Petitioners cite Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983) to contend the Court has recognized that in light of the antidumping law's inherent complexity, the agency's attempts to interpret and apply the statute are entitled to special deference. Petitioners state it is not the responsibility of the Department to interpret and apply the WTO agreements or decisions of its dispute settlement bodies, as TKN is suggesting. Petitioners add the Department would not be permitted to change its "zeroing" policy without invoking procedures required by section 123 of the Tariff Act. Petitioners conclude the Bed Linens from India and Softwood Lumber from Canada decisions do not indicate the Department's general policy of "zeroing" negative margins, in the context of administrative review proceedings, is contrary to international law.

Department's Position:

We disagree with TKN and have not changed our calculations of the weighted-average dumping margin as suggested by the respondent for these final results. As TKN cited in its case brief, the Court upheld the Department's treatment of non-dumped sales in Corus, PAM, and The Timken Company v. United States, 240 F. Supp. 2d 1228 (CIT 2002), and our methodology is consistent with our statutory obligations under the Tariff Act.

Furthermore, the Federal Circuit recently affirmed the Department's methodology. The Timken Company v. United States, No. 03-1098, 03-1238, 2004 U.S. App. LEXIS 627 (Fed. Cir. Jan. 16, 2004). As discussed below, we include U.S. sales that were not priced below normal value (NV) in the calculation of the weighted-average dumping margin as sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow U.S. sales that were not priced below NV to offset dumping margins found on other sales.

Section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV value exceeds export price (EP) or constructed export price (CEP), and dividing this amount by the value of all sales. The use of the term "aggregate dumping margins" in section 771(35)(B) is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) as applying on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV on sales that did not fall below NV permitted to cancel out the dumping margins found on other sales.

This does not mean, however, that non-dumped sales are ignored in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that Customs is not in a position to know which entries of subject merchandise are dumped and which are not. By spreading the liability for dumped sales across all reviewed sales, the weighted-average dumping margin allows Customs to apply this rate to all merchandise subject to review.

Finally, with respect to respondent's WTO-specific arguments, we note U.S. law, as implemented through the URAA, is fully consistent with our WTO obligations.

Comment 6: Whether to Split Gauge Group 16

TKN asserts the Department, for model matching purposes, must split gauge group 16 into four separate gauge groups. As presently constituted, gauge group 16 covers the thinnest sheet and strip products, with gauges ranging between 0.0000 mm and 0.0050 mm. See TKN's Case Brief at 9. TKN contends the Department has the discretion to change its model match methodology if to do so would yield a more similar match. See Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 66110 (October 30, 2002) (Rebar from Turkey) and accompanying Issues and Decision Memorandum. TKN argues there are significant and quantifiable physical differences among the products currently covered by gauge group 16; these physical differences are reflected in substantial differences in the cost of production and price. Respondent explains that the gross prices for two products identical in all respects except thickness will generally be different, even if the actual thicknesses of the two products fall within the same GAUGEH/U code. TKN states section D of the questionnaire instructs respondents to calculate production cost based on a weighted-average production costs for a particular CONNUM. The difference in production costs for "different products" within a particular CONNUM is not reflected in the CONNUM-specific VCOMH and TCOMH data. TKN asserts the thickest foil and thinnest foil gauge have been assigned the same CONNUMH and, therefore, the same value for VCOMH and TCOMH.

TKN maintains that gauge group 16 covers a significantly broader gauge of products than any of the other gauge groups. TKN argues the average difference between the top and bottom of the gauge ranges for the Department's first 15 gauge groupings is 131.7 percent. In contrast, respondent contends the difference between the top and bottom range of gauge group 16 is 623.8 percent. TKN asserts if gauge group 16 were split into four separate gauge groups, the average difference between the top and bottom of the gauge ranges for these four sub-groups would be 159.2 percent. See TKN Case Brief at Exhibit 2.

TKN maintains the only gauge group 16 products sold in the U.S. market during the POR were produced by ThyssenKrupp VDM GmbH (TKVDM). TKN further argues TKVDM did not participate in the original investigation and, therefore, did not have an opportunity to comment on the model match methodology adopted in that proceeding and used ever since. TKN urges the Department to reconsider at this time whether the model match methodology should be revised to address product characteristics that are specific to TKVDM's products.

Petitioners respond by stating that during the first introduction of the Department's product characteristics coding in the original investigation, petitioners noted the Department must include actual element contents in the hierarchy of product matching characteristics in order to comply with the

Federal Circuit's decision in Cemex, S.A. v. United States, 133 F.3d 897 (Fed. Cir. 1998) (Cemex) (that all possible "similar" model match comparisons be exhausted prior to resorting to constructed value (CV)). Petitioners assert that avoiding excessively segmented gauge designations has allowed the Department to implement its policy following the Cemex decision to exhaust similar match possibilities before resorting to CV. Petitioners submit the creation of sub-gauges (or for that matter, sub-grades, sub-widths, etc.) would transform the thousands of unique product control numbers into hundreds of thousands of unique product control numbers, each with unique VCOM and TCOM values, and would change what are currently identical product matches into similar matches with far more iterations, difference in merchandise (DIFMER) failures, and possibly would resort to CV. The proposed sub-group segmenting, petitioners contend, is directly at odds with Cemex, which seeks to maximize the possibility of price-to-price matching. See Petitioners' Rebuttal Brief at 8.

Petitioners assert any revision to product matching criteria is a highly fact-based, product-specific issue. They aver concrete steel rebar and antifriction bearings have product specifications that are completely separate from the merchandise subject to this proceeding. Petitioners reject TKN's citing Rebar from Turkey, claiming the revisions in that case were fundamental and necessary to end the matching of coiled rebar and straight rebar. See Petitioners' Rebuttal Brief at 9. Petitioners argue the changes made in Rebar from Turkey would be the equivalent of the Department revising an incorrect matching of coiled sheet and strip to uncoiled (i.e., cut-to-length) sheet and strip. This, petitioners insist, is not at all similar to segmenting longstanding multiple gauge designations.

In addition, petitioners argue gauge group 16 has always been the designator for precision strip products. Petitioners contend TKN is requesting the Department to apply a series of gauge designations that are not industry standard to subdivide precision strip. Petitioners insist this request is equivalent to proposing a physical hierarchy for precision strip as if that were the like product, rather than one commercial subset in the true like product. Petitioners insist TKN's request is belated and due to TKVDM's absence in the original investigation. See Petitioners' Rebuttal Brief at 9. They insist TKN had its own experience with precision strip products, defining TKN Dahlerbruck precision strip mill output as between 0.002 and 0.059 inches in thickness. See Petitioners' Rebuttal Brief at 10. Petitioners contend TKVDM reported its sales in the first and second administrative reviews, but did not raise this issue. They claim TKN has found that in this review, segmenting gauge group 16 into subcategories leads to lower margins, i.e., it is proposing a results-driven, rather than industry-standard revision. Petitioners argue TKN should have, at the very minimum, directed the Department to some industry standard that would designate multiple sub-groups within precision strip gauge group 16. Petitioners conclude revising the standard gauge group definitions easily descends into a limitless, arbitrary, and results-driven exercise.

Department's Position:

The Department agrees with petitioners. The Department refrains from revising the model match criteria unless there is evidence the model match is not reflective of the merchandise in question, there have been industry changes to the product that merit a modification, or there is some other compelling reason present requiring a change. Inherent in this practice is the notion that the model match criteria should be consistent across reviews so that parties may have a predictable means of determining possible product matches in current as well as future administrative reviews. Thus, while not ruling out the possibility of changing the model match criteria in a given proceeding, the Department, as evidenced by its practice, has established a high factual threshold that parties must overcome with evidence relevant to the industry as a whole or some other compelling argument in order to consider a change in the model match criteria. See Memorandum to Jeffrey A. May, Deputy Assistant Secretary, from Mark Ross, Acting Office Director, "Antifriction Bearings (and Parts Thereof) from France, Germany, Italy, Japan, Singapore, and the United Kingdom - Model Match Methodology," July 7, 2004. Respondent has not provided evidence of a change in industry standards, or any other compelling evidence, to warrant a change in the model match criteria.

Furthermore, the nature of TKN's request to revise the model match criteria raises complex and cross-cutting issues, for example, the issue of whether the Department would have to apply any such revisions to the model match criteria currently applied to the multiple companies and countries covered by the antidumping duty orders of stainless steel sheet and strip in coils. We find these are complicated issues that simply cannot be addressed within the context of a review of one company, subject to one of the seven cases involving stainless steel sheet and strip in coils. For these reasons, we find that TKN has failed to adequately demonstrate the necessity for a revision to the model match criteria currently in place.

Comment 7: Other Revisions to the Calculation

1. TKN asserts the incorrect general and administrative (G&A) expense ratio was applied to TKVDM's cost data.

   Petitioners concur.

   The Department will correct the G&A ratio applied to TKVDM's cost data.

2. TKN argues the Department applied the incorrect short-term lending rate. Respondent suggests applying the POR average short-term lending rate and not the fiscal year short-term lending rate.

   Petitioners disagree and state the Department should apply the extended POR short-term lending rate, including the window months.

   The Department will apply the TKN's POR average short-term lending rate to calculate the antidumping margin.

4. TKN claims field indicating whether the merchandise was of prime quality (PRIMEH) was incorrectly included in the sales below cost test.

Petitioners counter TKN's argument and state the Department's practice is to include PRIMEH in the sales below cost test.

Pursuant to the Department's practice, we will continue to use PRIMEH in the cost test. See Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Final Results of Antidumping Duty Administrative Review, 69 FR 2566 (January 16, 2004) and Memorandum to Joseph A. Spetrini, Deputy Assistant Secretary for Compliance from Roland L. MacDonald, Director, Office of Agreements Compliance regarding Treatment of Non-Prime Merchandise for the First Administrative Review of Certain Carbon Steel Flat Products dated April 19, 1995.

5. TKN argues the nickel price adjustment and downstream processing costs were incorrectly included in TKN's general and administrative expense (GNA) ratio calculation, and downstream processing costs were double-counted.

Petitioners agree with TKN that the nickel adjustment should be excluded from the GNA ratio, but do not agree that NSC's processing costs are not properly considered part of the total cost of manufacturing. See Petitioners' Rebuttal Brief at 6.

The Department will correct the language in the margin calculation to exclude the revised nickel from the GNA ratio and not to double count NSC's processing costs. See Final Analysis Memorandum, December 6, 2004.

Department's Position:

The Department acknowledges that the clerical and programming errors noted above. We have corrected these errors in our final results. For all program corrections, adjustments, and the explanations made in our final results, see Final Analysis Memorandum, December 13, 2004, at 2-3.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the positions set forth above and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final determination and the final weighted-average dumping margins for all firms in the Federal Register.

Agree____________ Disagree____________ Let’s Discuss____________

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James J. Jochum
Assistant Secretary
for Import Administration